United States Department of the Interior

OFFICE OF THE SOLICITOR

SEP 1 1 2002

Chief William W. Phillips
Aroostook Band of Micmacs
7 Northern Road
Presque Isle, Maine 04769

Re: Memorandum to the U.S. Environmental Protection Agency (EPA)

Dear Chief Phillips:

Thank you very much for submitting to us the detailed legal analysis of the sovereignty and jurisdiction of the Aroostook Band of Micmacs (Micmacs). As you know, attorneys from this Department and the Department of Justice worked closely with your counsel in developing the analysis contained in that memorandum. Additionally, attorneys from both departments independently researched the legal issues and we prepared a summary of our analysis and conclusions. We have provided that summary and your detailed legal memorandum to EPA. We are enclosing a copy of our summary memorandum for your files. We understand EPA will review the legal analyses as part of its process for making a decision on Maine's application to administer the Maine Pollutant Discharge Elimination System within the lands and waters of the Micmacs.

If you have any questions regarding this matter, please do not hesitate to contact me or Jean Rice, of my staff. Jean can be reached at (202) 208-6260.

Sincerely,

Philip N. Hogen
Associate Solicitor

United States Department of the Interior

OFFICE OF THE SOLICITOR

Memorandum SEP 1 1 2002

To: **Robert E. Fabricant**
Office of General Counsel
U.S. Environmental Protection Agency

From: **Philip N. Hogen**
Associate Solicitor

Re: **Retained Sovereignty of the Aroostook Band of Micmac Indians – State of Maine's Application to Administer Maine Pollutant Discharge Elimination System within Indian Country**

On January 12, 2001, the U.S. Environmental Protection Agency (EPA) approved the State of Maine's application to administer and enforce the Maine Pollutant Discharge Elimination System program for all areas within the state, other than Indian country. We understand EPA's decision regarding Indian country remains outstanding. The Department, as the primary federal agency responsible for interpreting the Maine Indian settlement acts, has analyzed the legal status of the Aroostook Band of Micmac Indians (Micmacs) and we conclude that under the Aroostook Band of Micmac Settlement Act (ABMSA), the Micmacs have retained their inherent tribal sovereignty.

Accompanying this memorandum is a detailed legal analysis that the attorney for the Micmacs prepared in consultation with attorneys from this Department and the Department of Justice. We have carefully studied the contents of the Micmacs' memorandum and independently researched the issues. The Micmacs' detailed legal memorandum incorporates comments from the two Departments and we concur with its conclusions. Accordingly, this memorandum provides a summary of the shared legal opinions.

The 1980 Maine Indian Land Claim Settlement Acts Initially Subjected the Lands and other Resources of the Micmacs to State Jurisdiction

In 1980, the Maine legislature enacted the Maine Implementing Act, 30 M.R.S.A. §§ 6201 - 6214 (MIA) to codify a settlement the state had reached with the Penobscot Nation and Passamaquoddy Tribe. MIA, however, did not assert state jurisdiction only over the Penobscot Nation and Passamaquoddy Tribe. Rather, the Maine state legislature enacted sweeping provisions that if ratified by Congress, would subject all tribes within the State of Maine to state jurisdiction. In

1980, Congress approved and ratified MIA in the federal Maine Indian Claims Settlement Act of 1980 (MICSA), thereby making the state's assertions of jurisdiction over the Maine tribes constitutional.

Although neither MIA or MICSA refer to the Micmacs by tribal name, the statutes applied to the Micmacs due to the comprehensive provisions applicable to all Indian tribes within the State of Maine that were then or would be in the future federally recognized. Section 725(a) of MICSA provides that with the exception of the Penobscot Nation and Passamaquoddy Tribe:

> all Indians, Indian nations, or tribes or bands of Indians in the State of Maine and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

Similarly, section 6204 of MIA provides:

> All Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

Congressional ratification and approval of MIA's comprehensive provisions applicable to tribes other than the Penobscot and Passamaquoddy, extinguished any land claim the Micmacs may have had in 1980 and subjected the Micmacs to state law.

The 1989 State and 1991 Federal Micmac Settlement Acts Replaced the Earlier Settlement Acts to the Extent the Earlier Acts Applied to the Micmacs

In the years immediately following the enactment of the 1980 Maine settlement acts, the Micmacs engaged the services of anthropologists to document their case for acknowledgment as a federally recognized Indian tribe. By 1989, the State of Maine recognized the Micmacs' aboriginal claim and enacted an act to "Implement the Aroostook Band of Micmacs Settlement Act." (Chapter 148 of Public Laws of 1989, 30 M.R.S.A. § 7201 *et seq.*) (MMA). Among other provisions, this state statute contains provisions regarding the Secretary of Interior accepting land into trust for the Micmacs and the application of state law to the Micmacs' lands and resources. Such provisions, however, only would become effective upon Congressional approval and

ratification.

The MMA was presented to Congress and in 1991, Congress acted by passing the "Aroostook Band of Micmac Settlement Act," Pub. L 102-171, Nov. 26, 1991, 105 Stat. 1143 (ABMSA). In passing the ABMSA, Congress established the federal framework under which the state and the Micmacs would coexist. Specifically, the ABMSA provided the Micmacs with:

- federal recognition;
- $900,000 in a land acquisition fund;
- $50,000 in a property tax fund;
- authority to request the Secretary of the Interior to hold lands in trust for the Micmacs;
- protections against alienation and state condemnation of trust lands;
- the right to receive federal services because of their status as Indians;
- the authority to establish a tribal government;
- the status of an "Indian tribe" for purposes of the Indian Child Welfare Act.

See generally ABMSA §§ 4 - 12. Significantly, Congress also specified that the ABMSA would govern in the event of a conflict of interpretation between the ABMSA and the state settlement acts (MIA and MMA) and the earlier federal settlement act (MCSA). ABMSA § 11.

Although the ABMSA established a legal framework similar to the one MICSA established for the Maine tribes and the state eleven years earlier, the ABMSA contains no provision subjecting the Micmacs to state jurisdiction. *Compare* § 1725(a) of MICSA, which subjects Maine tribes to state law, with the ABMSA, which contains no such provision. Instead, the ABMSA refers to the state MMA, intending that the provisions of the MMA would govern the jurisdictional relationship between the Micmacs and the state. *See* section 2(b)(4)(a purpose of the ABMSA is to "ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs"). On its face, the MMA would subject the Micmacs and their resources to Maine laws and to the civil and criminal jurisdiction of the state courts to the same extent as any other person or lands or other natural resources within the state.

The MMA does not Subject the Micmacs to State Law because the MMA Never Became Effective

Section 4 of the MMA establishes two conditions precedent before the MMA becomes effective. First, it requires Congressional ratification of the act without modification and Congressional approval of future amendments to the act, provided the Micmacs agree to the amendments. Second, it provides that the act will be effective only if "[w]ithin 60 days of adjournment of the Legislature the Secretary of State receives written certification by the Council of the Aroostook Band of Micmacs that the band has agreed to this Act." The second condition has not been fulfilled as the Micmacs never certified their approval of the MMA.

This lack of a certification required for an act's effectiveness has arisen before in the context of Maine-Indian relations. In 1985, then Attorney General of Maine, James E. Tierney, was asked

to render an opinion on the effectiveness of a state statute that needed a similar certification. In that instance, for the statute to become effective, the state statute required that the Secretary of State receive within sixty days of the Legislature's adjournment a certification from the Penobscot Nation that the nation had agreed to the provisions of the act. Literal compliance with that "effective date" provision was not achieved because the Penobscots had provided the appropriate certification to the Secretary of State on the 62nd day after the Legislature's adjournment. Attorney General Tierney opined that because the Secretary of State did not receive the necessary certification within the 60-day period following adjournment of the Legislature, the act did not become effective. The Attorney General reasoned in his opinion that it was important to "be strict in interpreting these provisions" because they pertain to the "question of land acquisition." Additionally, the Attorney General wrote that a contrary interpretation could render the statute subject to third party challenges and place a cloud on title to the Indian lands, which would be a "disadvantage to both the tribe and the state." *See* Tierney Opinion, attached.

Similarly, the Maine Attorney General's Office has questioned the effectiveness of the MMA in a June 2000 letter, Maine Assistant Attorney General William R. Stokes raised concerns that the MMA may not be in effect due to the lack of the Micmacs' certification. *See* Stokes Letter, attached. Applying Attorney General Tierney's and Assistant Attorney General Stokes' reasoning to the question whether the MMA is effective leads us to conclude that the MMA is not in effect.

Congress Impliedly Ratified the MMA, but the MMA Remains Without Effect

The language of the ABMSA and its legislative history clearly show Congress intended to ratify the MMA. Section 2(b) of the ABMSA provides that it is the purpose of the act to: (1) provide federal recognition to the Micmacs, (2) provide to the members of the Band services which the U.S. provides to Indians because of their status as Indians, (3) place $900,000 in a land acquisition and property tax fund, and (4) "**ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs.**" (Emphasis added; *see also* attachment II and VII of the enclosed detailed legal memorandum showing Congress intended to ratify the MMA.) However, for unknown reasons, the substantive portion of the ABMSA contains no ratification language. The ABMSA only contains substantive provisions accomplishing the purposes listed as 1 though 3, above. The statute's substantive provisions are silent on purpose 4 (ratification of the MMA). However, when Congress' intent to ratify an act is as clear as it is in the ABMSA, a court likely would find an implied ratification. *See, e.g., Utah Ass'n of Counties v. Clinton*, 1999 U.S. Dist. Lexis 15852 (D. Utah 1999) (without an express ratification by Congress, the critical issue when deciding whether ratification exists is determining congressional intent). Our analysis supports the conclusion that Congress ratified the MMA by implication.

Even if ratified, however, the MMA remains without effect. Congressional ratification does not alter the underlying state statute and does not cure the failure to meet the conditions required in the "Effective Date" section of the MMA. Certainly Congress has the authority to abrogate the sovereignty of the Micmacs and subject the Micmacs to state law. However, as noted above, the federal ABMSA does not contain any such language. The "bare" ratification of the MMA would have made Constitutional the state's assertion of jurisdiction over the Micmacs, had the MMA been in effect, according to the MMA's terms. Congress does not have the authority over the states to modify the state statute's conditions precedent for becoming an effective state law. *See* enclosed detailed Micmac memorandum, pp 15 - 19. Accordingly, we conclude that there is no legal provision in effect that subjects the Micmacs to the laws of the state.

Congress Intended the MMA and ABMSA to Embody the Settlements with the Micmacs, thereby Repealing the Provisions of the MMA and MICSA Previously Applicable to the Micmacs

Until Congress enacted the ABMSA, MICSA and MIA governed the relationships between the Micmacs and the state and federal governments. Under those earlier statutes, the Micmacs, for example, were without federal recognition and thus were ineligible to receive federal benefits to Indian tribes or to have land taken into trust for the benefit of the tribe. Additionally, as discussed above, the earlier statutes subjected the Micmacs to state law. In 1991, Congress intended the combination of the state MMA and the federal ABMSA to embody the entire settlement with the Micmacs. The settlement acts are complex and Congress anticipated the possibility of conflicts of interpretation among the various statutes. To address this concern, Congress enacted section 11 of the ABMSA, which provides that the ABMSA is to govern any such conflict. By intending the ABMSA and MMA to encompass the complete expression of the settlement with the Micmacs, Congress impliedly repealed the provisions of MICSA and MIA previously applicable to the Micmacs. To the extent Congress intended the earlier settlement acts to continue to apply to the Micmacs, Congress specified those sections in the ABMSA. For example, section 6(b) of the ABMSA provides that federal law shall apply to the Micmacs in the same manner as federal law applies to tribes accorded federal recognition under MICSA. Additionally, section 8 of the ABMSA maintains the state's jurisdiction over child welfare matters as provided in MICSA. If MICSA and MIA continued to apply in their entirety to the Micmacs post-ABMSA, Congress would have had no need to specify that certain sections continued in their effect.

Conclusion

According to long-standing principles of Indian jurisprudence, tribal sovereignty or jurisdiction cannot be eliminated by ambiguous federal legislation. Courts require that waivers of tribal sovereign immunity be clear, concise and unequivocal. Given no clear Congressional act abrogating the Micmacs' sovereignty, the tribe fully retains its inherent sovereignty and jurisdiction. The accompanying tribal memorandum provides a detailed analysis of the legal issues summarized in this memorandum.